Supreme Court, U.S.
FILED
07-20 JUL 2 - 2007
OFFICE OF THE CLERK

No. 06-___

IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,
Petitioner,

v.

MEERA SAMANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the standard for fraudulent joinder include a consideration of the plaintiff's "good faith" intent to pursue the action against a non-diverse defendant, or is it merely a question of whether the plaintiff has stated a viable claim in her complaint against the non-diverse defendant. If consideration of "good faith" intent is included in the standard for fraudulent joinder, must the court look beyond the pleadings to make that determination.

Where the defendant makes out a prima facie case of "bad faith" or lack of intent to prosecute in the removal petition, does the burden of proof shift to the plaintiff to show a lack of "bad faith" or a good faith intent to prosecute the claims asserted against the non-diverse defendant.

Does this Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), mandate a finding that the defendant has satisfied its burden of proving fraudulent joinder where the plaintiff fails to take issue with or object to any allegations made in the removal petition or supporting documentation.

Does this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and earlier U.S. Supreme Court decisions, mandate judgment be affirmed where the non-diverse defendant remains unserved at the time of judgment.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all the parties to the appellate proceeding in the Ninth Circuit Court of Appeals, whose judgment is sought to be reviewed:

A. Petitioner

Barr Laboratories, Inc.

B. Respondent

Meera Samanta

CORPORATE DISCLOSURE STATEMENT

Petitioner Barr Laboratories, Inc., is the wholly-owned subsidiary of Barr Pharmaceuticals, Inc. Barr Pharmaceuticals, Inc., is a publicly traded stock company. No publicly held company owns 10% or more of Barr Pharmaceuticals, Inc.'s stock.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is not a reported decision. A copy of the Court's Judgment and Memorandum are reprinted in the Appendix ("App.") at 1a-4a. The trial court's decisions relating to removal of the action from the Superior Court of the State of California for the County of Orange are reprinted at App. 5a-11a.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its decision on April 2, 2007. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. § 1332(a), (b), and (c); 28 U.S.C. § 1441(a), (b), and (c); 28 U.S.C. § 1446(a), (b), and (d); and, 28 U.S.C. § 1447, which are set forth in the Appendix at 12a-18a.

INTRODUCTION

A. Certiorari Should Be Granted To Clarify Existing Ambiguity Regarding the Law Related to Removal of Actions from State to Federal Court

This case presents a rare opportunity for the Court to provide long-overdue guidance to the federal judiciary regarding a doctrine with roots embedded in century-old precedent – a doctrine not addressed by this Court in almost 90 years. This Court has recognized for over 100 years that "Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Alabama G. S. R. Co. v. Thompson*, 200 U.S. 206, 218 (1906).

Although the early decisions of this Court established the basic framework for fraudulent joinder analysis, some aspects of the doctrine were left unaddressed or undeveloped. The doctrine was born at a time when the removal statute permitted a separable controversy against a diverse defendant to be removed to federal court notwithstanding the plaintiff alleged claims against other non-diverse defendants. The test for removal of a controversy, as developed at that time, focused on the nature of the plaintiff's claims; i.e., were the claims as alleged separable or non-separable. The touchstone of that determination was the plaintiff's pleading and the question was whether plaintiff's claim asserted a joint liability or merely a several liability against the non-diverse defendant.

In early cases, a non-resident defendant often argued that the plaintiff improperly alleged a joint claim against it and a

non-diverse defendant in order to preclude removal of the action to federal court. In response, this Court stated that

> in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner – unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

Louisville & N. R. Co. v. Wangelin, 132 U.S. 599, 601 (1890). As defendants frequently did no more than make conclusory statements that the plaintiff's claims were not joint and that the plaintiff had fraudulently joined a resident defendant to preclude removal, the test applied to determine fraudulent joinder often focused on the nature of the plaintiff's claim; i.e., joint or several, as determined from the plaintiff's pleading.

However, that courts may consider evidence outside of the pleadings was actually established by the first case in which this Court found a resident defendant had been fraudulently joined. In *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907), the court relied not only upon the pleadings, but also upon evidence presented to the court by way of affidavits. The defendant in *Wecker* alleged in its removal petition that the resident defendant had been fraudulently joined in plaintiff's complaint in order to defeat defendant's right to removal. In addition, the defendant submitted affidavits to support the allegations in the removal petition. *Id.* at 180-81. The plaintiff in response to the removal petition also filed an affidavit. *Id.* at 181. On appeal from the lower court's decision granting defendant's removal petition, the plaintiff argued that the lower court erred in considering the affidavits and should have limited its decision regarding the

fraudulent joinder of the non-diverse defendant to the allegations in the complaint. This Court rejected the plaintiff's contention and approved the district court's consideration of all the evidence before it in making its determination. In the end, this Court concluded that the plaintiff did not make the "slightest attempt" to support the allegations in his complaint against the resident defendant and agreed with the lower court's finding that the resident defendant was fraudulently joined and affirmed removal of the action. *Id.* at 186.

Futhermore, the last time this Court addressed the issue of fraudulent joinder, in 1921, its decision made clear that consideration of plaintiff's good faith intent in prosecuting claims against a non-diverse defendant was appropriate. In *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the defendant asserted in its removal petition that "it was not [the] purpose of the plaintiff to prosecute the action in good faith" against the resident defendant. *Id.* at 94. In plaintiff's motion to remand the case, the plaintiff did not "in any wise traverse or take issue with any of the allegations of the petition for removal." *Id.* at 95. Although it noted the defendant must carry the burden of proof, the Court stated that "if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98. As a result, the Court affirmed the lower court's denial of plaintiff's motion to remand concluding "the joinder was a sham and fraudulent – that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the [resident defendant] – the result must be the same whether the local law makes for or against a joint liability." *Id.* at 98-99.

In the 90 or so years since *Wecker* and *Wilson* were decided, federal courts have strayed from or even ignored the doctrine as established by this Court. This may be due to some perceived inconsistencies in this Court's earliest cases.

For example, in addressing claims of fraudulent joinder, this Court acknowledged a defendant could attack the "good faith" of the plaintiff in the action and stated that a defendant could allege fraud on the part of the plaintiff in joining a resident defendant. *See Wangelin*, 132 U.S. at 603 (affirming denial of removal petition noting "it is enough to say that no fraud was alleged in the petition for removal, or pleaded, or offered to be proved in the Circuit Court," but not stating it is necessary to allege or prove fraud by plaintiff in joining non-diverse defendant); *Chesapeake & O. R. Co. v. Dixon*, 179 U.S. 131, 135 (1900) (affirming denial of removal petition noting the "petition for removal did not charge fraud . . . or set up any facts and circumstances indicative thereof," but not stating it is necessary to allege or prove fraud by plaintiff in joining non-diverse defendant). Yet, those same cases also noted that the plaintiff's "motive" or "purpose" in joining diverse and non-diverse defendants was not open to inquiry. *See Dixon*, 179 U.S. at 135 (noting "plaintiff's motive in the performance of a lawful act [alleging a joint cause of action] was not open to inquiry"). Many federal courts have adopted the Court's statements that the plaintiff's "motive" is not open to inquiry, but have ignored the Court's positive proclamation that the "good faith" of the plaintiff is open to inquiry in determining if a resident defendant has been wrongfully joined in an action to preclude removal. As a result, federal courts often limit the fraudulent joinder inquiry to whether a plaintiff has stated a viable claim against the resident defendant in the complaint, ignoring facts that establish the plaintiff never intended in good faith to prosecute a claim against the resident defendant.

In addition, since the Court last spoke to the issue decades ago, the removal statute has changed and the Federal Rules of Civil Procedure have been adopted. With those developments, removal of an action from state to federal court no longer turns on the separable or non-separable nature of the claims against the defendants. Without subsequent guidance

from this Court, federal courts have been left to reconcile on their own this Court's jurisprudence with the removal statute and the requirements established by the Federal Rules of Civil Procedure. The result is a conflict among the federal courts regarding the standards and procedures to apply when determining whether a plaintiff has joined a non-diverse defendant in good faith, as opposed to those circumstances where the resident defendant was joined solely for the purpose of divesting the diverse defendant of its right to seek federal court jurisdiction. Existing precedent from this Court does not fully address the complex and myriad issues arising in lawsuits around the country that are removed to federal court today.

Increasingly, plaintiffs are employing new and novel strategies to frustrate defendants' legitimate rights to remove actions to federal court. As the fraudulent joinder doctrine plays an ever more critical role in determining the jurisdiction of federal courts in actions removed from state courts, it is imperative that lower federal courts receive clear guidance regarding its scope and application. In the absence of that guidance, courts and parties often are left to guess as to what constitutes a good faith joinder of a non-diverse defendant; particularly, what standard will be employed in making the determination, how the burden of establishing that the joinder of a resident defendant is not in good faith is satisfied, and what evidence may be considered in making the determination. This Court should grant review of this case in order to resolve the issues involving removal and good faith joinder of non-diverse defendants.

B. The Ninth Circuit's Decision, Based on the Facts of this Case, Is Wholly-Inconsistent with Supreme Court Precedent

In addition, the Court should grant review of this case as the Ninth Circuit's decision conflicts with this Court's prior precedent, including its decision in *Wilson v. Republic Iron &*

Steel Co., 257 U.S. 92 (1921), and the Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

In *Wilson*, this Court held that if the plaintiff does not take issue with or object to the statements made in the removal petition, he "must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it." *Wilson* at 98. Here, plaintiff neither took issue with the statements made in defendant's removal petition and supporting documents nor with those in the response and supporting documents filed by defendant pursuant to a show cause order issued by the district court. Under the Court's holding in *Wilson*, plaintiff admitted the statements in defendant's removal papers. As a result, affirmance of the removal and subsequent judgment on behalf of defendant was warranted, and thus the Ninth Circuit's decision was incorrect.

That the Ninth Circuit's decision contradicts this Court's precedent is further supported by this Court's decision in *Caterpillar*. In *Caterpillar*, this Court instructed that if diversity did exist at the time judgment was entered, a judgment should be affirmed even though it did not at the time of removal. Here, although plaintiff pled the necessary elements of valid claims against the non-diverse defendant, plaintiff never served the non-diverse defendant – not prior to removal, after removal, or at any time prior to entry of final judgment. As a result, the non-diverse defendant never became a party to the litigation, and at the time judgment was entered in favor of defendant, complete diversity existed warranting affirmance under *Caterpillar* of the judgment for defendant.

STATEMENT OF THE CASE

This is a wrongful death action originally filed in the Superior Court of the State of California, Orange County. Pro se plaintiff Meera Samanta's complaint contained product liability claims against Barr Laboratories, Inc. ("Barr"), a Delaware corporation with its principal place of business in New

York, and medical malpractice and lack of informed consent claims against Olina Harwer, M.D., a California resident. (*See* App. at 37a-47a.) Mrs. Samanta alleged she was a resident of California. (*See* App. at 35a.)

Upon the filing of her complaint on November 13, 2003, the clerk of the Superior Court issued a summons that included "Notice to Defendant: (Aviso a Acusado) Olina Harwer, M.D., Barr Laboratories, Inc., and Does 1 through 100, Inclusive." (*See* App. at 30a.) Mrs. Samanta served Barr on January 12, 2004. (*See* App. at 26a.) However, Mrs. Samanta never served Dr. Harwer or any John Doe defendants. (*See id.*) Dr. Harwer never filed an answer or otherwise appeared in the state court action. (*See id.*)

On February 24, 2004, Barr first learned that Mrs. Samanta had not served Dr. Harwer. Rule 201.7(b) of the California Rules of Court provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." Barr also discovered that Mrs. Samanta had not applied for a state court order extending the time to serve a pleading, as provided by the California Code of Procedure ("C.C.P.") Rule 201.7(e). (*See id.*) There also was no indication the state court on its own motion had extended or otherwise modified the C.C.P. Rule 201.7 requirement that the complaint be served on all named defendants and proofs of service on those defendants be filed within 60 days after the filing of the complaint. (*See id.*) In addition, Dr. Harwer had not answered the Complaint. (*See id.*)

On March 4, 2004, Barr filed a removal petition to comply with the 30-day requirement in 28 U.S.C. § 1441. (*See* App. at 19a-66a.) Less than two weeks later, on March 18, 2004, the district court ordered Barr to show cause, in writing, why the case should not be remanded. (*See* App. at 67a-68a.) In that order, Judge Taylor quoted the following language from

the Ninth Circuit Court of Appeals' decision in *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174 (9th Cir. 1969):

> A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant . . . . Whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.

(*See id.*) The district court went on to note that "[a]lthough Dr. Harwer has not been served or responded to the complaint, [s]he remains a named defendant. Removal does not appear appropriate." (*Id.*)

Barr filed its response to the district court's show cause order on April 16, 2004. (*See* App. at 69a-81a.) In its response, Barr averred that Mrs. Samanta had no intention of prosecuting an action against Dr. Harwer. Barr stated that "even in the face of Barr's removal petition, filed over a month ago on grounds of fraudulent joinder, plaintiff has continued to evince her lack of intention to serve Dr. Harwer." (*See* App. at 74a.)

Mrs. Samanta never attempted to refute any of Barr's contentions relating to removal. She did not respond to Barr's initial removal petition; she did not respond to the district court's show cause order; and she did not respond to Barr's brief in response to the district court's show cause order. In addition, even though she clearly was on notice Dr. Harwer had not been served, Mrs. Samanta never served or even attempted to serve Dr. Harwer.

As a result, on April 23, 2004, the district court vacated its order to show cause, thereby retaining jurisdiction. (*See* App. at 10a-11a.) In its order, the district court noted that "[a]t this stage, it appears Defendant Dr. Harwer is joined fraudulently

and removal is appropriate." (*See* App. at 10a.) In support of its conclusion, the district court relied on *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F. Supp. 845, 848 (S.D. Cal. 1955), which held that

> where it appears that the plaintiff has no intention of serving the resident defendants and attempting to recover judgment against them, the Court is justified in concluding, as a matter of fact, that they were joined in bad faith for the sole purpose of preventing Federal jurisdiction, and that, hence, the joinder is fraudulent.

(App. at 10a-11a.)

However, the district court's order also extended a second invitation to Mrs. Samanta to challenge the removal. Specifically, the court's order advised Mrs. Samanta that "[i]f appropriate at a future time, Plaintiff may make a showing of the good faith joinder of Dr. Harwer." (App. at 11a.) Yet again, Mrs. Samanta, who by her own admission had the "unofficial" assistance of counsel in filing her case, failed to take any action – she did not object to the district court's conclusion, she did not seek the issuance of a summons from the district court, and she did not attempt to serve a state court summons. Instead, Mrs. Samanta pursued her action solely against Barr for more than a year.

Throughout the course of the case, as it proceeded in federal court, Mrs. Samanta never directed discovery to Dr. Harwer, she never served any papers or pleadings on Dr. Harwer, and did not otherwise prosecute any claims against Dr. Harwer.

Following the close of discovery, Barr filed a motion for summary judgment. After Barr's summary judgment motion was fully briefed, and just two days before the district court issued its order ruling on Barr's motion for summary judgment, Mrs. Samanta filed an Ex Parte Application For Review of Barr Laboratories, Inc., Removal of Lawsuit to

Federal Court. At that point, and at the time judgment was entered, Mrs. Samanta still had not served Dr. Harwer or requested the issuance of a summons for Dr. Harwer from the district court.

On March 10, 2005, the district court issued an order granting Barr's motion for summary judgment and denying Mrs. Samanta's ex parte application requesting review of the court's earlier order on removal. (*See* App. at 7a-9a.) The judgment of the district court was entered on March 22, 2005. (*See* App. at 5a-6a.)

On March 28, 2005, Mrs. Samanta filed a Notice of Appeal. In her notice she indicated she was appealing not only the district court's grant of summary judgment in favor of Barr, but also the district court's order denying her ex parte application for a review of the court's order permitting removal, the district court's order vacating the order to show cause why the case should not be remanded, and the order denying her ex parte motion for an extension of the discovery deadline. In her appellate brief, Mrs. Samanta addressed only the district court's orders regarding removal.

In a three-page memorandum, the Ninth Circuit vacated the district court's order and remanded with instructions to remand the case to state court. (*See* App. at 2a-4a.) The Ninth Circuit stated that the district court could exercise subject matter jurisdiction over this action only if Dr. Harwer, the non-resident defendant, was fraudulently joined. (App. at 3a.) According to the Ninth Circuit,

> "'[f]raudulent joinder' is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

(*Id.*)

The Ninth Circuit held that the district court misapplied the fraudulent joinder test. (App. at 3a.) According to the court,

> [t]he key inquiry is whether Samanta's complaint put forward any viable theory against Dr. Harwer. Samanta's complaint pleads each element of a cause of action for medical negligence and lack of informed consent against Dr. Harwer. Furthermore, Barr does not offer any argument or facts challenging the viability of these claims. Since Barr did not meet its burden of proving that Dr. Harwer was fraudulently joined, removal was inappropriate.

(App. at 3a-4a.)

REASONS FOR GRANTING THE PETITION

A. This Court Should Define the Scope of the Fraudulent Joinder Doctrine and Establish Clear Standards To Be Applied by Federal Courts in Determining Whether a Non-Diverse Defendant Has Been Joined in Good Faith and What Courts May Consider in Making that Determination

Although the Ninth Circuit stated the defendant is entitled to present facts showing the joinder of a non-diverse defendant is fraudulent, its decision indicates that the only facts a defendant may present to establish fraudulent joinder are facts tending to show the claims alleged by the plaintiff against the non-diverse defendant "fail to state a cause of action" against that defendant. (*See* App. at 3a.) The Ninth Circuit is not alone among the federal courts in limiting the inquiry on the question of fraudulent joinder to the validity of the plaintiff's claims against the non-diverse defendant as reflected in the plaintiff's complaint. *See, e.g., Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (noting it had articulated a standard close to a dismissal standard, approving a removal to federal court, if "on the face of plaintiff's state court pleadings, no cause of action lies against the resident defendant").

In doing so, federal courts have strayed from the doctrine as established by this Court. In those federal courts where a plaintiff need only state a claim against any non-resident defendant to deprive the true target (non-resident) defendant of federal court jurisdiction, the doctrine of fraudulent joinder as established by this Court has been completely eviscerated.

This Court's decisions establish that where the plaintiff does not show a good faith intent to prosecute a claim against a non-diverse defendant, the joinder is a sham and fraudulent. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907). In *Wecker*, the inquiry was not limited to whether the plaintiff stated a viable claim against the defendant, and the Court considered more than merely the plaintiff's pleading.

Since this Court last addressed the fraudulent joinder doctrine, many federal court decisions have focused on a portion of the Court's decisions to the exclusion of the rest. The "good faith" and "intent to prosecute" aspects essentially have disappeared from the doctrine. Yet, in today's legal climate, especially with the advent of notice pleading, it is the rare plaintiff who cannot recite all the elements of a viable claim against any defendant without having any intention of pursuing that claim. Indeed, plaintiff trial attorney groups advocate ways in which plaintiffs can preclude a defendant from removing an action to federal court. Any number of methods exist for a plaintiff to state a viable claim against a non-diverse defendant while having no intention to prosecute that claim. This case presents just such an example – the complaint contains the necessary elements of a claim against a non-diverse defendant, but the plaintiff's acts (and omissions) lead to the inescapable conclusion that plaintiff never intended to prosecute those claims against the resident defendant in this lawsuit.

1. The Definitions and Tests for Fraudulent Joinder Differ Among the Federal Courts

In straying from the doctrine as initially developed by this Court and effectively eliminating the "good faith" and "intent to prosecute" aspects, federal courts have developed different definitions and tests of fraudulent joinder. *See Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (containing an in-depth discussion of the various mutations of the fraudulent-joinder standard throughout the circuits).[1] For instance, in some courts joinder is fraudulent if there is "no reasonable basis" in law or fact supporting the claim. *See Filla v. Norfolk & Southern Ry.*, 336 F.3d 806, 810 (8th Cir. 2003) (stating "joinder is fraudulent when there exists no reasonable basis in fact and law supporting a claim . . . ."); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) *cert. denied* 498 U.S. 1085 (1991) (stating "joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant"). *But see In re Briscoe*, 448 F.3d 201, 217 (3d Cir. 2005) (stating "[j]oinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment"). Other courts employ a slightly different variation of the "reasonable basis" definition. *See Jerome-Duncan, Inc. v. Auto-by-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999) (stating fraudulent joinder exists if the plaintiff did not have at

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[1] In *Travis*, 326 F.3d at 647, the court noted that even relevant treatises have not been entirely consistent. "Moore's Federal Practice states at one point: 'To establish fraudulent joinder, a party must demonstrate . . . the absence of any possibility that the opposing party has stated a claim under state law.' 16 James Wm. Moore et al., Moore's Federal Practice, P 107.14[2][c] [iv][A] (3d ed. 2000). It then comments: 'The ultimate question is whether there is arguably a reasonable basis for predicting that state law might impose liability on the facts involved.'" *Id.*

least "a colorable claim against the non-diverse defendant in state court"); *Smoot v. Chicago., R. I. & Pac. R.R. Co.*, 378 F.2d 879, 881 (10th Cir. 1967) (stating the joinder is fraudulent if the allegations are without factual basis and a complete sham).

Courts in the Fourth, Second, and Eleventh Circuits use a definition of "no possibility" of recovery. *See, e.g., Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (noting fraudulent joinder exists where "there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant"); *Whitaker v. Amer. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (stating defendant is fraudulently joined where "there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court"); *Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (stating joinder is fraudulent if "there is no possibility the plaintiff can establish a cause of action against the resident defendant").

The Fifth and Seventh Circuits state fraudulent joinder exists where there is "no reasonable possibility of recovery." *See, e.g., Gray v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400, 405 (5th Cir. 2004) (noting fraudulent joinder exists where the plaintiff does not have a "reasonable possibility of recovery in state court")[2]; *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (stating fraudulent joinder exists if there is "no reasonable possibility that a state court would rule against the [in-state] defendant").

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[2] *But see Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc), *cert. denied* 544 U.S. 992 (2005) (noting fraudulent joinder exists where defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant).

The First and Ninth Circuits define fraudulent joinder as a "failure to state a claim." *See, e.g., Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983) (stating "fraudulent joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the [non-diverse] defendant . . . ."); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (stating "[f]raudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent").

Even within a circuit, the district courts apply varying standards. *See, e.g., Filla v. Norfolk & Southern Ry.*, 336 F.3d 806 (8th Cir. 2003) (noting "[i]n *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983), we articulated something close to a dismissal standard, approving a removal to federal court, if 'on the face of plaintiff's state court pleadings, no cause of action lies against the resident defendant.' As might be expected, our district courts have used standards that run the gamut-from requiring plaintiff to actually state a cause of action, to a more lenient threshold requiring a removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant. *E.g., Reeb v. Wal-Mart Stores*, 902 F. Supp. 185, 187-88 (E.D. Mo. 1995); *Parnas v. General Motors Corp.*, 879 F. Supp. 91, 92 (E.D. Mo. 1995).").

There are at least three different definitions and tests employed by the federal courts in deciding the question of fraudulent joinder. Those differences result in an inconsistency of result depending on the jurisdiction in which the case is filed and the issue is raised.[3]

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[3] One of the unintended consequences of the conflicts among the federal circuit courts is prejudice to a defendant depending on where an

2. Federal Courts Employ Different Procedures to Determine if a Non-Diverse Defendant is Fraudulently Joined

Along with employing different definitions and tests, the federal courts employ different procedures to determine if a non-diverse defendant is fraudulently joined. Some courts hold that the plaintiff's complaint may not be pierced in deciding the questions of fraudulent joinder, *see, e.g., Schwenn v. Sears, Roebuck & Co.*, 822 F. Supp. 1453, 1455 (D. Minn. 1993), while others hold the complaint may be pierced, *see, e.g., Smoot*, 378 F.2d 879. Of those courts that permit piercing of the pleadings, some permit only limited piercing, while others engage in much broader piercing.

3. The Standards and Tests Do Not Comport with This Court's Decisions

These various and conflicting definitions, tests, and procedures fail to comport with the doctrine as established by this Court in the late 19th and early 20th centuries. This Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921), made clear that a joinder is a sham and fraudulent where plaintiff "without any purpose to prosecute the action in good faith" against the resident defendant joins the defendant in the complaint. The Court's statement of the doctrine is not, never has been, and should not be, limited to whether a plaintiff merely has stated a claim against the non-diverse defendant in the complaint.

Equally clear from this Court's decisions is the notion that courts are not limited to making the determination of fraudulent joinder by the pleadings alone. It is only where the removing defendant does not allege and show the defendant was wrongfully made a party that the propriety of removal is

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action is filed. A defendant's right to avail itself of federal court jurisdiction should not be dependant upon where an action is filed.

based upon the complaint alone. *See Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 601 (1890) (holding "in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court").

That the court's inquiry into the fraudulent joinder of a non-diverse defendant should not be limited to only the pleadings is evidenced by the Court's decision in *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 180 (1907). In *Wecker*, the plaintiff complained that rather than looking only to the complaint, the district court considered affidavits filed by the parties in determining whether the action should be remanded. The *Wecker* Court noted the distinction between cases in which plaintiff's complaint was the only document on record at the time the removal petition is filed and those in which the parties filed documents in support of and in opposition to the removal. *Id.* at 181-82. The Court acknowledged that in the former instance only the pleading would be considered in determining whether the action should be remanded. *Id.* at 182.

However, for cases that fell within the second instance, the Court approved consideration of the affidavits, noting that in cases in which it is shown by the removal petition or otherwise that the plaintiff is attempting to sue in state court with a view to defeat the defendant's right to federal jurisdiction, different questions arise. *Id.* at 182. In such instances, the Court stated federal courts not only may, but also should, take such action as will defeat attempts to wrongfully deprive parties entitled to federal court jurisdiction of the protection of their rights. *Id.* at 183. The Court affirmed the district

court's conclusion that the non-diverse defendant was joined merely for the purpose of defeating defendant's right to remove the case to federal court based on the complaint, coupled with the affidavits filed in support of and in opposition to removal. *Id.* at 186.

This Court should grant certiorari to address the scope of the fraudulent joinder doctrine and establish clear standards to be employed by federal courts in making the determination of whether a non-diverse defendant has been fraudulently joined.

B. This Court Should Clarify the Burden of Proof for Establishing Fraudulent Joinder

In its decision, the Ninth Circuit ignored numerous facts that were before the district court both when it vacated its show cause order regarding the removal and when it denied plaintiff's eleventh-hour attempt to avoid entry of judgment against her. The Ninth Circuit, without discussion, concluded that Barr did not meet its burden of proving that Dr. Harwer was joined fraudulently. However, the Ninth Circuit focused only on whether Barr presented argument or facts challenging the viability of Mrs. Samanta's claims, ignoring facts that showed Mrs. Samanta did not in good faith intend to prosecute the action against Dr. Harwer. That construction of the defendant's burden of proof strays from this Court's decisions which acknowledged that a defendant could establish the joinder of a resident defendant was fraudulent if the defendant showed the plaintiff did not have good faith intent to prosecute a claim against the resident defendant.

Very early on, this Court held the removing party had the burden of showing removal was proper, including where it was alleged that the non-diverse defendant was joined in an effort to preclude the defendant from removing the case. *See Plymouth Consolidated Gold-Mining Co. v. Amador & Sac-*

ramento Canal Co., 118 U.S. 264, 270-71 (1886). *See also Louisville & N. R. Co. v. Wangelin*, 132 U.S. 599, 602 (1890).

Then in *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907), this Court affirmed the denial of plaintiff's motion to remand because the plaintiff failed to make even the "slightest attempt" to support the allegations in the complaint in response to defendant's affidavits in support of removal. In rejecting plaintiff's objection that there was no proof that the plaintiff knew of the facts as recited in defendant's affidavit in support of removal, the Court explained that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." *Id.*

The burden of proof was addressed again in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). In *Wilson*, the defendant in the removal petition alleged that "it was not [the] purpose of the plaintiff to prosecute the action in good faith" against the non-diverse defendant. *Id.* at 94. In his motion to remand, the plaintiff did not take issue with or object to any of the statements made in the defendant's removal petition supporting the allegation of plaintiff's lack of intent to prosecute. *Id.* at 95. Instead, the plaintiff merely challenged the removal on the grounds that one of the defendants was a resident of the state. In affirming the denial of plaintiff's motion to remand, this Court clearly stated that if

> a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions. [Citations omitted.] The petition must be verified . . . , and its statements must be taken by the state court as true [citations omitted]. If a removal is effected, the plaintiff may, by a motion to remand, plea, or answer, take issue with the statements in the petition. If he does, the issues so arising must be

> heard and determined by the District Court [citations omitted] and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding [citations omitted]. But if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it. [Citations omitted.]

Id. at 97-98. The Court concluded that the plaintiff's failure to refute or object to the allegations in the removal petition made it apparent the resident defendant was "joined as a defendant without any purpose to prosecute the action in good faith as against him with the purpose of fraudulently defeating the [diverse defendant's] right of removal." *Id.* at 98.

The Court's decisions in *Wecker* and *Wilson* establish, if not explicitly, at least implicitly, that if a defendant makes a prima facie showing that a non-diverse defendant has been joined only to defeat the defendant's right to removal, the plaintiff must come forward with some evidence to show the non-diverse defendant was joined in good faith. However, the lower federal courts have departed from this Court's precedent and applied a different and nearly insurmountable burden of proof. *See, e.g., Davis v. Standard Oil Co.*, 47 F.2d 48, 50-51 (8th Cir. 1931) (holding "[t]he burden of proof is upon the removing defendant, and the fraud of the plaintiff must be proven by evidence that is clear and convincing"). The principle as developed and applied by some federal courts does not permit shifting of the burden to the plaintiff. *See, e.g., Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983 (D. Nev. 2005) (noting burden of proof on issue of fraudulent joinder may not be shifted to plaintiff); *Hardaway v. Merck & Co., Inc.*, 2006 WL 2349965 (S.D. Ill. 2006) (noting court does not shift burden of proof on claim of fraudulent joinder to plaintiffs). *But see Lane v. Champion Int'l Corp.*, 827 F. Supp. 701 (S.D. Ala. 1993) (stating that if

defendant satisfies initial burden, burden shall shift to plaintiff to establish, at very least, genuine issue of fact exists concerning appropriateness of joinder).

Also in contrast to the Court's decision in *Wecker*, some lower federal courts do not require that a plaintiff submit affidavits or other evidence to rebut the allegations and evidence supplied by the removing defendant. *See Hauck v. ConocoPhillips Co.*, 2006 WL 1596826, n.4 (S.D. Ill. 2006) (noting a removing defendant's submission of evidence in support of a claim of fraudulent joinder does not impose a burden on plaintiff to submit evidence to disprove fraudulent joinder); *Phillips Petroleum Co. v. AIG Tech. Servs., Inc.*, 99 F. Supp. 2d 787, 791 (S.D. Tex. 2000) (noting although plaintiff on motion to remand could submit affidavits and deposition transcripts to rebut removing defendant's allegation of fraudulent joinder, plaintiff is not required to do so).

As a result, in today's federal courts, a defendant can present evidence showing a plaintiff has no intention to prosecute a claim against a non-diverse defendant and has merely joined that party to defeat removal of the action (as Barr did), and the plaintiff can remain silent, relying merely on the allegations in the complaint to defeat removal of the action (as Mrs. Samanta did). A plaintiff should not be permitted to remain silent, but should be required to marshal some evidence in opposing a defendant's removal of the action.

This Court should grant certiorari in this case in order to clarify and define the burden of proof for establishing fraudulent joinder.

C. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)

The Ninth Circuit's decision conflicts with this Court's decision in *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). In *Wilson*, this Court held that if the plaintiff does not

take issue with or object to the statements made in the removal petition, he "must be taken as assenting to its truth and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98.

Barr provided evidence to the district court with its Notice of Removal to show Mrs. Samanta had not served Dr. Harwer within the time allowed under state service rules and contended that lack of service evidenced an intent by Mrs. Samanta not to prosecute her action against the doctor. (*See* App. at 26a, 22a.) In response to the district court's show cause order, Barr contended Mrs. Samanta did not intend to prosecute her action against Dr. Harwer and provided evidence that Dr. Harwer still had not been served in support of its contention. (*See* App. at 74a, 77a-81a.)

Mrs. Samanta never responded. Instead, plaintiff remained silent. By the time plaintiff filed her notice for reconsideration with the district court only days prior to entry of judgment in favor of Barr, plaintiff's actions throughout the litigation confirmed Barr's contention that plaintiff had no intention to pursue her claim against Dr. Harwer in this lawsuit. The case had been pending in federal court for over a year by that time and plaintiff still had not served Dr. Harwer, had not sought to have the district court issue a summons for Dr. Harwer, and had not asked the court to permit service on Dr. Harwer. Furthermore, plaintiff did not involve Dr. Harwer in any aspect of the litigation.

The Ninth Circuit ignored those facts. Doing so was in direct contradiction to this Court's decision in *Wilson*.

D. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and earlier U.S. Supreme Court Decisions

The Ninth Circuit order vacating the district court's judgment in favor of Barr conflicts with this Court's decision in

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996), and earlier precedent of this Court, as well. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16 (1951) *superseded by statute on other grounds* (noting "[t]here are cases which uphold judgments in the district courts even though there was no right to removal" *citing Baggs v. Martin*, 179 U.S. 206 (1900).) *See also Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972) (noting "[l]ongstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court" in the posture the case was in at the time of judgment).

Caterpillar involved personal injury claims arising under state law. The case was removed to a federal court at a time when complete diversity of citizenship did not exist among the parties. *Caterpillar*, 519 U.S. at 64. Promptly after removal, the plaintiff moved to remand, but the district court denied that motion. *Id.* at 65-66. Before trial, all claims involving the non-diverse defendant were settled, and that defendant was dismissed as a party to the action. *Id.* at 66. The case proceeded to trial and judgment for the removing defendant. *Id.* at 66-67. The court of appeals vacated the judgment, concluding that, absent complete diversity at the time of removal, the district court lacked subject matter jurisdiction. *Id.* at 67.

This Court reversed based on an "overriding consideration," holding that "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Caterpillar*, 529 U.S. at 75. This Court held that "a district court's error in failing to remand a

case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar*, 519 U.S. at 64. *See also McCabe v. General Foods Corp.*, 811 F.2d 1336, 1338 (9th Cir. 1987) (*citing Lewis v. Time, Inc.*, 710 F.2d 549, 552 (9th Cir. 1983) and stating "When a remand motion is denied and the case is tried on the merits, the issue is whether the district court would have had jurisdiction had the case been filed in federal court 'in the posture it had at the time of entry of judgment.' . . . . Diversity jurisdiction is measured by the final posture.").

Unlike Mrs. Samanta, who acquiesced in Barr's averments regarding the bad faith joinder of Dr. Harwer and subsequently failed to serve Dr. Harwer or take any action whatsoever to prosecute the case against her, the plaintiff in *Caterpillar* was diligent and "by timely moving for remand, did all that was required to preserve his objection to removal." *See Caterpillar*, 519 U.S. at 74.

At the time judgment was entered in this action, complete diversity existed between the only parties to the action, Mrs. Samanta and Barr, the only named and served defendant. The district court recognized in its order granting summary judgment that Dr. Harwer was not a party to this action. (*See* App. at 9a: "The fact that Doctor Harwer may have been involved in an arbitration proceeding with Plaintiff does not mean she is a party to this case.")

As a result, even if Barr had removed the action prematurely and the district court were not therefore required to ignore the presence of the resident defendant joined in bad faith, the fact that Dr. Harwer had not been made a party to the action by service of a complaint and summons prior to final judgment, rendered diversity complete when the district court entered judgment.

A defendant who is not served with a complaint is not a party to an action. *See Saucier v. Katz*, 533 U.S. 194, 212 n.1 (2001) (Ginsburg, J., dissenting) (stating: "Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation."); *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969) (holding that the term "parties" in 28 U.S.C. § 1407 should not be construed to include unserved defendants, as "'[p]arties' is ordinarily used to designate only those who are named as such in the record and who are properly served with process or enter their appearance."); *Nagle v. Lee*, 807 F.2d 435, 441 (5th Cir. 1987) (holding that appeal from judgment dismissing suit against all served defendants was sufficient for purposes of a "final decision" under 28 U.S.C. § 1291 because any remaining unserved defendants were not parties in the case, and therefore no certificate for interlocutory appeal was required under Rule 54(b)). *See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347, 350 (1999) (stating, "[w]e read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process"; and "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as a defendant"; and "one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend").

To overcome the outcome dictated by *Caterpillar*, Mrs. Samanta argued that "sham" parties are not automatically eliminated from a suit and claimed that because Dr. Harwer was never dismissed from this action, "the jurisdictional defect that occurred upon the act of removal was never cured." Mrs. Samanta accepted, however, that had the

district court simply dismissed Dr. Harwer on its own motion, it would be beyond dispute that jurisdiction existed at the time of dismissal. Short of that, she claimed that any defect in removal remained uncured.

However, "once a matter is removed to federal court on the basis of fraudulent joinder, the non-diverse 'party' is no longer a party at interest." *See Jewell v. Dudley L. Moore Insurance, Inc.*, 872 F. Supp. 1517, 1520 (M.D. La. 1995). Furthermore, if the fact that Dr. Harwer was not formally dismissed created a housekeeping issue, the appellate court could have dismissed Dr. Harwer on its own motion. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

The Ninth Circuit's order vacating the district court's judgment is at odds with this Court's decision in *Caterpillar* and earlier decisions of this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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